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CITATIONS

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380910—56——1

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. ---------

BOYD LEEDOM, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD,[1] PETITIONERS

v.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on November 10, 1955, as amended March 15, 1956, reversing the District Court for its failure to issue a preliminary injunction against Board action declaring

[1] On November 18, 1955, Boyd Leedom succeeded Guy Farmer as Chairman of the Board, and on December 1, 1955, Stephen S. Bean succeeded to the vacancy of the fifth member of the Board. On March 30, 1956, the court below entered an order, providing for substitution of the new Board member in the instant case (R. 129).

respondent International Union of Mine, Mill and Smelter Workers (hereafter called "the Union") out of compliance with Section 9 (h) of the National Labor Relations Act, as amended. The Board action was based on findings, arrived at after investigation and hearing, that the non-Communist affidavits filed, pursuant to that section, by Union officer Maurice E. Travis were false, and that the Union membership was aware of their falsity.

OPINION BELOW

The opinion of the Court of Appeals, filed November 10, 1955, is set forth in Appendix A, *infra*, p. 26, and is reported at 226 F. 2d 780. The order of the Court of Appeals, filed March 15, 1956, which amended that Court's judgment of November 10, 1955, is set forth in Appendix A, *infra*, pp. 28–31, and has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1955 (App. A, *infra*, p. 27). On January 31, 1956, by order of Chief Justice Warren, the time for filing a petition for a writ of certiorari was extended to and including April 7, 1956 (App. B, *infra*, p. 32). Thereafter, on March 15, 1956, the Court of Appeals entered an order amending its earlier judgment (App. A, *infra*, pp. 28–31). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the National Labor Relations Board, upon finding that a union officer has filed false non-Communist affidavits and that the union membership was aware of their falsity, has power to declare the union out-of-compliance with Section 9 (h) of the National Labor Relations Act and to cancel any benefits under the Act accorded to the union on the basis of those affidavits.

STATUTE INVOLVED

Section 9 (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 146, 65 Stat. 601, 602, 29 U. S. C. 159 (h), provides:

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with

such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

STATEMENT

1. THE EVENTS GIVING RISE TO THE BOARD'S ADMINISTRATIVE INVESTIGATION AND HEARING

Section 9 (h) of the National Labor Relations Act, as amended, (*supra*, pp. 3–4) disqualifies a labor organization from receiving statutory benefits under the Act unless each of its officers files annually with the Board an affidavit stating that he is not a member of or affiliated with the Communist Party, and that he does not believe in, or support, and is not a member of, any organization that believes in or teaches the overthrow of the Government by force or by illegal and unconstitutional methods.[2] Commencing in August 1949, and annually thereafter, the Union's Secretary-Treasurer, Maurice E. Travis, and the other Union officers filed such affidavits (R. 3–4, 38).[3]

In 1953, during the course of a proceeding be-

[2] The constitutionality of this provision was upheld by this court in *American Communications Association* v. *Douds*, 339 U. S. 382.

[3] When the instant suit was commenced, in February 1955, the most recent affidavit filed by Travis was dated October 19, 1954 (R. 4).

fore the Board entitled *Precision Scientific Company* (Case No. 13–CA–1441)—involving the question of whether that Company's refusal to bargain with the Union violated Section 8 (a) (5) of the Act—the Company (hereafter called "Precision") challenged the veracity of Travis' 9 (h) affidavits (R. 23–24). It alleged, *inter alia*, that, at the time he filed his initial affidavit in August 1949, Travis, in a statement published in the Union's newspaper and distributed to its members, asserted that he had resigned from the Communist Party solely in order to make it possible to execute a 9 (h) affidavit, but that he nevertheless continued to adhere to the principles of Communism and the Communist Party (R. 24, 76, 79).

On February 4, 1954, the Board, following its practice of treating the sufficiency of a union's compliance with Section 9 (h) as a subject which, though not litigable by private parties in representation or unfair labor practice proceedings, is appropriate for separate administrative investigation and determination, issued an order directing an administrative investigation and hearing (33 LRRM 1322–1323, R. 33–34). The order recited the above facts alleged by Precision and set forth the Board's view that, if Travis' affidavits were in fact false to the knowledge of the Union membership, this would require cancellation of the

Union's compliance status under the Act. It directed that a hearing be held before a hearing officer of the Board for the purpose of receiving evidence pertaining to the issues (1) whether Maurice E. Travis had admitted that the affidavits which he filed with the Board pursuant to Section 9 (h) of the Act were false, and (2) whether the membership of the Union was aware that such affidavits were false. The order also provided that, after issuance of the hearing officer's report, exceptions thereto, briefs, and requests for oral argument could be filed with the Board itself.

2. THE BOARD'S FINDINGS AND CONCLUSIONS

Hearings were held before a hearing officer of the Board between May 10 and July 14, 1954 (R. 24, 34). The Union and Travis were represented by counsel and were afforded full opportunity to be heard, to produce, examine, and cross-examine witnesses, to introduce evidence relevant to the issues specified in the Board's order, to argue orally, and to file briefs (*ibid.*).[4] Travis not only failed to appear or to take the stand in his own behalf, but he also refused to respond to a subpena *ad testificandum* issued at the request of the Board's General Counsel (R. 27, 36).

On September 10, 1954, the hearing officer issued his report finding, *inter alia,* that Travis'

[4] Counsel for Precision was also permitted to appear and to participate as *amicus curiae* (R. 34).

August 1949 statement disclosed on its face that his contemporaneous non-Communist affidavit filed with the Board was false; that the evidence disclosed that his subsequent affidavits were also false; and that the membership of the Union was aware of the falsity of Travis' 1949 and subsequent affidavits, yet continued to reelect him (R. 32–79). The Union and Travis were given an opportunity to, and did, file exceptions to the report and a supporting brief. In addition, they filed a motion for an order directing the hearing officer to withdraw his report and to conduct a further hearing (R. 25).

On February 1, 1955, the Board issued its determination and order (R. 23–32), adopting in general the hearing officer's report. The Board's findings and conclusions may be summarized as follows:

"The Travis statement, published in the Union newspaper of August 15, 1949, admits that the sole reason for his alleged resignation from the Communist Party was "in order to make it possible for me to sign the Taft-Hartley affidavit", and that such step was taken "with the utmost reluctance and with a great sense of indignation" (R. 76). The statement then goes on to assert, *inter alia*, that the "very premise of the Taft-Hartley affidavits is a big lie"; that it "is a big lie to say that a Communist trade unionist owes any higher loyalty than to his union"; and that the "biggest lie of all is to say that the Com-

munist Party teaches or advocates the overthrow of the government by force and violence" (R. 77). In addition, Travis frankly acknowledged that, despite his alleged severance of Communist Party ties, he continued to believe in "Communism", and emphasized (R. 78–79):

> I want to make it absolutely clear that my opinion continues to be that only a fundamental change in the structure of our society * * * can lead to the end of insecurity, discrimination, depressions and the danger of war.
>
> I am convinced that capitalistic greed is responsible for war and its attendant mass destruction and horror.

The Board found that this newspaper statement "disclosed on its face Travis' admission of the falsity of his August 4, 1949, non-Communist affidavit" (R. 25). In arriving at this conclusion, the Board considered the meaning of the statement in the light, *inter alia,* of the undisputed evidence of Travis' long-established position as a member of the Communist Party; of his role as one of its leaders within the Union; and of his admission to former Union official Mason that "the Party people" at Communist Party headquarters in New York had cleared the statement, and that "it meant that while Travis was resigning his membership in the Communist Party, it would not stop or change his work for it" (R. 26, 39–41, 60–61).

In the alternative, the Board concluded that, even when read literally, the statement constituted an admission of the falsity of Travis' 1949 affidavit (R. 26). As the Board noted (R. 27):

> It would stretch credulity beyond understanding were we required to assume that Travis had abandoned his Communist beliefs or his support of the Communist Party when he asseverates in the article "that good-Communists are good trade unionists" working against the "rotten * * * foundation of the capitalistic system," and that "despite my resignation from the Communist Party, I shall continue to fight for these goals with all the energy and sincerity at my command." [See also R. 61–64.]

The Board further found that the undisputed evidence showed that, subsequent to August 1949, Travis had "not altered his allegiance to nor support of the Communist Party, nor his belief in the overthrow by force and violence of this Government", and that hence his succeeding affidavits were likewise false (R. 27).[5] Thus, the uncontradicted testimony of Mason reveals that in August 1953 he requested Travis to give due recognition to the non-Communist faction in the Union and liberalize the official Union newspaper

[5] This finding has subsequently been confirmed by Travis' recent conviction, under 18 U. S. C. 1001, for filing false 9 (h) affidavits. See Daily Labor Report, December 22, 1955, No. 248, p. A–3.

so that it would not always reflect the Soviet side (R. 41–42). Travis' reply was that "Mason and his brother had a chance 'to be way up with us in these councils if you would rejoin the Communist Party'" (R. 42). Moreover, as to the paper, "Travis rejected Mason's suggestion summarily, saying 'You know as well as I do that the Party and my people will not stand for those proposals'" (R. 42–43, 64–65).

Finally, the Board found that "the Union membership was aware of the falsity of *all*[6] of Travis' affidavits" (R. 27). It based this conclusion on the "evidence of the publication, in the Union's official newspaper, of Travis' 1949 article in which he admitted the falsity of his initial affidavit, and the distribution of that newspaper to all the Union members; the fact of general awareness in this country of the true nature, aims and methods of Communism and the Communist Party; and the evidence * * * that the members of the Union were better equipped than the general public properly to evaluate Travis' 1949 newspaper article and his subsequent Communist activities" (R. 27–28). Summarizing the latter evidence, the Board pointed to "the CIO's investigation of Communist domination of the Union and its final expulsion of the Union from the CIO in 1950; the revolt of scores of locals from the Union over the Com-

[6] Emphasis in original.

munist issue; the Senate Sub-Committee (Judicial Committee) investigation in 1952 of Communist affiliation of Travis and other Union leaders, and Travis' refusal at the Sub-Committee hearing in Salt Lake City to testify regarding his non-Communist affidavits; and the resulting publicity to Union members" (R. 28, fn. 9; see also R. 43–46, 66–68).

On the basis of these findings, the Board concluded that the Union was not, and had not been, in compliance with the filing requirements of Section 9 (h) of the Act, and ordered that the Union be accorded no further benefits under the Act until it had complied with these requirements (R. 31–32).[7]

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[7] The Union came back into compliance with Section 9 (h) on February 23, 1955, when, shortly after the instant suit was commenced, Travis resigned as Secretary-Treasurer and was replaced by Albert Pezzati, who filed the required affidavit. However, this does not make the instant suit moot. Since the complaint in the *Precision Scientific* case (*supra*, p. 5) was issued in June 1953, an affidavit by Travis is essential to its validity, and thus the propriety of a bargaining order in that case depends on whether the decompliance action here (R. 80–81) is sustained or nullified. The Board's order of February 16, 1955, dismissing the Union's complaint against Precision was vacated March 25, 1955, pursuant to the stay (*infra*, p. 12) issued by the court below. In addition, there are other cases where benefits, already accorded to the Union based on Travis' affidavits, would be subject to nullification were the Board's decompliance action sustained. *E. g.*, *Etiwan Fertilizer Co.*, 113 NLRB No. 11; *Magnus Metal Division of National Lead Co.* (Case No. 21–RC–3724); *Phelps-Dodge Copper Products Corp.*, 111 NLRB 950.

3. THE INSTANT SUIT

On February 10, 1955, the Union, contending, *inter alia,* that the Board's determination and order were beyond its powers under the Act, filed the instant suit in the United States District Court for the District of Columbia for injunctive relief against the Board action (R. 2–7). On February 11, 1955, that court, after hearing, denied the Union's motions for a temporary restraining order and a preliminary injunction (R. 10–12). The Union appealed the denial of the preliminary injunction to the Court of Appeals.

On February 21, 1955, the District Court granted Precision, whose obligation to bargain with the Union was affected by the Board's decompliance determination, leave to intervene in the suit as a party defendant, and to raise defenses in addition to those asserted by the Board; namely, that, even if the Board's action were beyond its powers under the Act, injunctive relief should nevertheless be denied the Union because it was not a *bona fide* labor organization and had "unclean hands" (R. 81–82, 101–112).

On February 25, 1955, the court below, pursuant to the Union's request, issued an order staying, during the pendency of the Union's appeal, the Board's decompliance determination as of the date of its issuance (35 LRRM 2577). On April

18, 1955, the Court of Appeals granted Precision leave to intervene as an appellee in the appeal.[8]

On November 10, 1955, the court below issued a *per curiam* opinion (App. A, *infra*, p. 26), stating that:

> The District Court's order, entered February 11, 1955, is reversed on the authority of *Farmer* v. *International Fur & Leather Workers Union*, — U. S. App. D. C., —, 221 F. 2d 862, decided February 15, 1955.

In the *Fur Workers* case, the Court of Appeals following its earlier decision in *Farmer* v. *United Electrical Workers*, 211 F. 2d 36, certiorari denied, 347 U. S. 943, had held that, under the scheme of the Act, a false 9 (h) affidavit gave rise only to a criminal penalty for the guilty union officer, and did not in any way alter the union's right to continued Board benefits, *even where* its members were aware of the officer's fraud.[9]

The judgment accompanying the foregoing opinion (App. A, *infra*, p. 27) remanded the case

[8] The record certified to the Court of Appeals contained the pleadings and proceedings before the District Court as of the time the appeal was filed, and also what had transpired in the District Court thereafter.

[9] In *United Electrical*, the court had only passed on the effect of a false affidavit absent membership awareness thereof, stating (211 F. 2d at 39): "We need not decide whether the union would be barred from the Act's benefits if its membership was aware of the alleged falsity of the affidavit."

to the District Court "for further proceedings not inconsistent with the opinion of this Court". On January 13, 1956, the District Court, viewing this opinion as not touching the issues interjected into the case by Precision (*supra*, p. 12), declined to enter a preliminary injunction. On March 15, 1956, the court below, pursuant to the Union's motion, entered an order (App. A, *infra*, pp. 28–31) which: (1) made clear that its earlier decision had encompassed all of the legal issues in the case, including those raised by Precision; and (2) amended the judgment of November 10, 1955, so as to remand the case to the District Court "with directions to issue a preliminary injunction".

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that the sole consequence of a false 9 (h) affidavit is a criminal penalty for the officer perpetrating the fraud is in conflict with the decision of the Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *Lannom Manufacturing Co.*, 226 F. 2d 194 (union petition for certiorari pending, No. 723, this Term), which holds that the conviction of a union officer for filing a false affidavit also affects the union's compliance status under the Act. Accordingly, the Board (a) has acquiesced in the petition filed in No. 723 insofar as it presents this question, and (b) is petitioning for certiorari in the instant case.

As noted in the Memorandum which the Board has filed in No. 723 (pp. 1–3), unless this conflict is resolved, the incongruous situation existing in No. 723 will continue and will probably be repeated in other cases. That is, the court below, which has exclusive venue over prohibitory suits against the Board, requires the Board to treat a union in compliance with Section 9 (h) of the Act, notwithstanding the falsity of its officer's non-Communist affidavit. However, when the Board seeks to comply with this mandate by filing an enforcement petition to secure the Act's benefits for the union in the Sixth Circuit, or any other circuit holding a similar view,[10] the petition may be dismissed on the ground that the union has not in fact complied with Section 9 (h). This situation, which results in frustrating both the administration of the Act and the judicial process, clearly calls for review by this Court.

2. The considerations justifying the grant of certiorari in this case are not diminished by the circumstance that the basic question of the Board's powers in respect to false 9 (h) affidavits was previously presented to this Court in two petitions which were denied in the October Term, 1953. *Farmer* v. *United Electrical Workers,* No. 597, and *Farmer* v. *International Fur and Leather Workers,* No. 598, certiorari denied, 347 U. S.

[10] See *National Labor Relations Board* v. *Vulcan Furniture Manufacturing Corp.*, 214 F. 2d 369, 371 (C. A. 5), certiorari denied, 348 U. S. 873.

943 (April 12, 1954). At the time these petitions were filed, no conflict between circuits, requiring resolution by this Court, had developed. Moreover, the earlier cases presented the compliance question in a posture which was less definitive, and hence perhaps less suitable for review, than that which exists in the instant case and in No. 723.

Thus, in *United Electrical,* the Board, prompted by the refusal of certain union officers, both before Congressional committees and a grand jury, to acknowledge the validity of the non-Communist affidavits which they had previously filed with the Board, had sent each officer a questionnaire requesting reaffirmation of his affidavits. The District Court enjoined the Board from conducting this investigation on the ground that, under the Act, the truth or falsity of an officer's 9 (h) affidavit was irrelevant to the Board's function; the court below affirmed, reserving the situation where the union membership might be aware of the officer's fraud (see fn. 9, *supra,* p. 13); and the Board petitioned for certiorari to review the Court of Appeals' decision. The companion petition in *Fur Workers* sought to by-pass the Court of Appeals and to review the action of the District Court, 117 F. Supp. 35 (D. D. C.), in enjoining, on the authority of *United Electrical,* the further Board measure of deferring, pending the outcome of the criminal proceeding, repre-

sentation cases involving a union whose officer had been indicted, under Section 35A of the Criminal Code (18 U. S. C. 1001) for filing a false non-Communist affidavit. Here, and in No. 723, on the other hand, there has been no attempt to by-pass the Court of Appeals and the question of the Board's powers is presented in a situation where the falsity of the officer's affidavit has clearly been established, and where it is also apparent that the union membership was aware of the falsity.[11]

In these circumstances, the earlier denials of certiorari are manifestly not dispositive of the instant petition or that in No. 723.

3. As this Court has recognized, Section 9 (h) of the Act was designed to minimize the threat of "political strikes" by "exerting pressures on unions to deny office to Communists" and other exponents of violent overthrow of the Government. *American Communications Association* v. *Douds*, 339 U. S. 382, 393. The holding of the court below that the sole consequence of a false 9 (h) affidavit is a criminal penalty for the officer filing the affidavit reduces this leverage to a feeble reed.

If the officer, though still a Communist, is will-

[11] In the instant case, these facts came to light through the Board's own investigation and hearing; in No. 723, they were established by the officer's criminal conviction for filing a false affidavit, after which the union nevertheless reelected him to his office.

ing to file a 9 (h) affidavit,[12] the union incurs no risk by keeping him in office even when, as here, its members are aware of his fraud from the outset. Similarly, should the union discover after the officer has filed an affidavit that he is still a Communist, the Act would provide no incentive for removing him from office, even where, as in No. 723, the officer's deceit has been established in criminal proceedings. To be sure, the officer may go to jail, but the union is able to keep all the benefits under the Act which it improperly acquired as a result of his wrongdoing. Finally, under the interpretation of the court below, the Board would be required, even where the officer admits the falsity of his affidavit at the time he filed it with the Board (which, in effect, is the situation in this case), to honor that affidavit and accord benefits to the union based thereon. To accord benefits to a union, one of whose officers is an undenied Communist, certainly frustrates "the congressional purpose * * * to 'wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Govern-

[12] It is now clear that the Communist Party of the U. S. A. has long followed the policy of having its members "formally" resign without really severing Party ties, and that this policy was specifically adopted in respect to 9 (h) affidavits. See R. 41; *Hupman* v. *United States*, 219 F. 2d 243, 247–248 (C. A. 6), certiorari denied, 349 U. S. 953.

ment.'" *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325.

4. The holding of the court below rests on the premise that, by explicitly providing "a criminal penalty for false non-Communist affidavits",[13] Congress intended to make the veracity of the affidavit irrelevant to the Board's function; for it "assumed that this threat of criminal sanctions would be a sufficient deterrent to false swearing by union officers". See *Farmer* v. *International Fur and Leather Workers Union*, 221 F. 2d 862, 864 (C. A. D. C.). This assumption, which substantially impairs the effectivness of Section 9 (h) (see pp. 17–18, *supra*), is wholly unwarranted.

The legislative history of Section 9 (h) discloses that the version of the provision which was originally passed by both houses of Congress forbade the granting of benefits under the Act to any labor union if its officers were members of the Communist Party or held other proscribed membership, affiliation or belief.[14] Under that version, the Board, *prior* to conferring benefits under the Act, would have had to conduct an inquiry into whether the officers were in fact free of the disqualifying characteristics (93 Cong. Rec. 6375, 6381). This was changed in conference—to the

[13] Section 9 (h) (*supra*, pp. 3–4) provides, *inter alia*, that "section 35A of the Criminal Code [18 U. S. C. 1001] shall be applicable in respect to such affidavits."

[14] 1 Legislatitve History of the Labor Management Relations Act, 1947 (Gov't Print. Off., 1948), pp. 190, 251.

present requirement that officers file disclaiming affidavits which, like other statements made to the Government, would be subject to Section 35A of the Criminal Code—solely for the reason that Board proceedings "might be indefinitely delayed if the Board *was required* to investigate the character of all the local and national officers as well as the character of the officers of the parent body or federation." [Emphasis added.][15]

Hence, Congress, in order to avoid delays in Board proceedings, made it clear that the Board was not required to permit private parties to such proceedings to litigate the alleged Communist character of the union involved.[16] It decided instead that the filing of disclaiming affidavits would be sufficient to open Board processes. However, it does not follow therefrom that there was any Congressional purpose to have this initial acceptance of affidavits preclude the Board itself, when fraud has been subsequently established in crimi-

[15] 93 Cong. Rec. 6444 (Senator Taft). See also, *id.*, at 6447, 6860; 1 Leg. Hist. 553.

[16] See *Aerovox Corp.* v. *National Labor Relations Board*, 211 F. 2d 640 (C. A. D. C.), certiorari denied, 347 U. S. 968; *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 649–651 (C. A. 6); *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371 (C. A. 5), certiorari denied, 348 U. S. 873; *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, 55 (C. A. 7). Cf. *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, No. 79, this Term, decided February 27, 1956.

nal or separate administrative proceedings, from altering the union's compliance status.

In these circumstances, the Board's action does not interrupt or otherwise delay particular unfair labor practice or representation proceedings, the problem which concerned Congress in adopting the affidavit technique. Accordingly, to read the legislative history as precluding Board power to decomply the union where the falsity of the officer's affidavit is subsequently established in separate proceedings, serves only to make the filing of affidavits, a requirement inserted solely as a means for facilitating the goal of withholding the Act's benefits from unions with Communist leadership,[17] the ultimate end of Section 9 (h); the affidavit technique, which was adopted only for the purpose of easing the Board's burden in unfair labor practice and representation cases, becomes a means of lessening the union's responsibility to clean out Communist officers.

On the other hand, to read this history as not precluding Board decompliance in such situation, gives effect to Congress' adoption of the affidavit technique, without at the same time obscuring the basic objective of Section 9 (h). The filing

[17] See *American Communications Association* v. *Douds*, 339 U. S. 382, 388; *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325; *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146, 162, 166–171, 175 (D. D. C.), affirmed, 334 U. S. 854.

of the required affidavits is sufficient to open up Board processes to a union, thereby avoiding collateral litigation in particular unfair labor practice and representation cases as to whether the union has rid itself of Communist leaders. However, this does not discharge the union's responsibility to insure that its house is in fact clean, for the benefits obtained on the basis of the affidavits may be lost should it subsequently be established, in separate proceedings which do not interrupt the course of particular unfair labor practice or representation cases, that they are false. The union is thus prompted to keep a continuing check on its officers, and to remove a Communist as soon as his deceit comes to light.

The Board's reading of the legislative history is also consistent with the scheme of Section 9 (h) which empowers the Board to declare a union out of compliance when, *inter alia,* an officer's affidavit has expired, the complement of officers has changed, or it has been found that certain union officials, who were in fact officers within the meaning of the section, have failed to file affidavits.[18] It seems hardly likely that Congress, although allowing the Board to alter the union's

[18] See National Labor Relations Board, 15th Annual Report (Gov't Print. Off., 1951), pp. 26–28; *National Labor Relations Board* v. *Dant*, 344 U. S. 375, 383; *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, No. 79, this Term, decided February 27, 1956.

compliance status in these situations,[19] precluded the Board from altering the union's compliance status in the more serious situation where the falsity of the affidavit itself has become apparent.

That Congress did not decide to preclude the Board from withdrawing the benefits of the Act when the falsity of an officer's 9 (h) affidavit has been established is further confirmed by a Senate report issued subsequent to the enactment of Section 9 (h).[20] This report discussed the steps which the Board had taken to prevent circumvention of Section 9 (h), including, as in the case of the *United Packinghouse Workers (Local 80A)* (101 NLRB 1253), the revocation of the union's compliance status and certifications on conviction of its officer for filing a false affidavit (pp. 8–9). It then concluded, *inter alia,* that such action is within the Board's "authority under existing law," and not inconsistent with Congress' intention to avoid Board conduct of "an independent investigation on the merits as to whether a par-

[19] This is often a "matter of happenstance" as regards "unions which do have leadership willing to comply". *National Labor Relations Board* v. *Dant*, 344 U. S. at 383, 384.

[20] *Public Policy and Communist Domination of Certain Unions*, S. Doc. No. 26, 83d Cong., 1st Sess., Report of the Subcommittee on Labor and Labor-Management Relations, March 2, 1953. The propriety of utilizing such post-legislative material has been recognized. See *Herzog* v. *Parsons*, 181 F. 2d 781, 785 (C. A. D. C.), certiorari denied, 340 U. S. 810; *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 922–923 (C. A. 6), certiorari denied *sub nom. Ann Arbor Press, Inc.* v. *National Labor Relations Board*, 342 U. S. 859.

ticular 9 (h) affiant is or is not a Communist" (*id.*, at 28–29). The false affidavit constitutes an "obvious abuse" of Board processes, and Section 9 (h) does not affect the power which the Act otherwise confers upon the Board "'to protect its own processes from abuse'" (*ibid.*).[21]

[21] This view is not inconsistent with the recent enactment of the Communist Control Act of 1954, 68 Stat. 775, Section 10 of which, *inter alia*, empowers the Subversive Activities Control Board to determine whether a labor organization is Communist-infiltrated, and provides that, upon such finding, the union shall be deprived of benefits under the National Labor Relations Act. 68 Stat. at 778, 50 U. S. C. (1952 ed. Supp. II) 792a. This new law does not purport to repeal Section 9 (h) of the Act, or otherwise lessen whatever powers the Board may have had thereunder. It recognizes that, with Section 9 (h) alone, many Communist-controlled unions could still obtain Board benefits; for to preclude them, it is necessary first to establish that their officers have filed false affidavits, a matter often difficult of proof. To meet this problem, this Act broadens the circumstances under which a union may be deemed Communist-controlled, enabling the SACB to make such determination on the basis of a variety of factors indicative of Communist-leadership and control. However, from this, it does not follow that the new law was designed to preclude the Board from continuing to deny benefits in any case where, as here, the rarer evidence that an officer falsified his 9 (h) affidavit exists. See R. 31, fn. 10.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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National Labor Relations Board.

APRIL 1956.

APPENDIX A

COURT OF APPEALS OPINION, JUDGMENT, AND ORDER

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12573

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, APPELLANT

v.

GUY FARMER, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEES,

AND

PRECISION SCIENTIFIC COMPANY, AN ILLINOIS COMPANY, INTERVENOR

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided November 10, 1955

Before EDGERTON, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges.

Per Curiam: The District Court's order, entered February 11, 1955, is reversed on the authority of *Farmer* v. *International Fur & Leather Workers Union*, — U. S. App. D. C. ——, 221 F. 2d 862, decided February 15, 1955.

Reversed.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,573. October Term, 1955

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, APPELLANT

v.

GUY FARMER, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEES,

PRECISION SCIENTIFIC COMPANY, AN ILLINOIS COMPANY, INTERVENOR

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before EDGERTON, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Dated: NOVEMBER 10, 1955.

PER CURIAM.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,573. January Term, 1956

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, APPELLANT

v.

GUY F. FARMER, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEES,

PRECISION SCIENTIFIC COMPANY, INTERVENOR

Before: EDGERTON, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges.

ORDER

Whereas appellant's motion filed herein February 27, 1956, for issuance of a mandate by this Court in this case and for other action to effectuate the judgment of this Court entered herein November 10, 1955, duly came on for hearing before this Court and was argued by counsel; and

Whereas it appears from said motion filed in this Court February 27, 1956, and from the transcript of the proceedings before the District Court on January 13, 1956, that pursuant to said judgment of this Court entered November 10, 1955, this appellant submitted to the District Court a proposed order for a preliminary injunction to carry out the judgment of this Court but that after a hearing thereon the District Court refused to enter a preliminary injunction but instead on January 13, 1956, ordered the case "restored to the non-jury calendar for the trial of issues not covered by" the judgment of this Court; and

Whereas said motion filed in this Court on February 27, 1956, may be treated by this Court as the equivalent of the taking of an appeal from the order of January 13, 1956, in so far as that order refuses a preliminary injunction, thus giving this Court jurisdiction to review the refusal of the District Court to issue a preliminary injunction in this case (See *Gerringer* v. *United States,* 93 U. S. App. D. C. 403, 213 F. 2d 346 (1954); *West* v. *United States,* 94 U. S. App. D. C. 46, 222 F. 2d 774 (1954); *R. F. C.* v. *Prudence Group,* 311 U. S. 579 (1941); *Lemke* v. *United States,* 346 U. S. 325 (1953)); or may be treated as a petition for writ of mandamus to compel the District Court to issue a preliminary injunction in this case; or may be treated as a motion to modify the judgment of this Court entered herein November 10, 1955; and

Whereas in the consideration of this appeal prior to the rendition of its opinion and judgment on November 10, 1955, this Court had before it sufficient material in the record from which it could and did conclude:

> (1) that the contention that the appellant lacks "clean hands" was not a sufficient reason for the denial of a preliminary injunction in this case;
>
> (2) that the District Court failed to reconsider its order on appeal herein in the light of the decision of this Court in *Farmer* v. *International Fur and Leather Workers Union,* 95 U. S. App. D. C. 308, 222 F. 2d 862, decided February 15, 1955, four days after the entry of the order of the District Court on appeal herein:
>
> (3) that the contention that the appellant was not "a labor union" within the

meaning of § 2 (5) of the National Labor Relations Act, 1947, was frivolous and did not constitute a reason for the denial of a preliminary injunction in this case; and

(4) that the contention that the affidavit in support of appellant's request for a preliminary injunction was improperly executed or was inadequate in any material respect would appear unsupported in the circumstances of this case;

Now, therefore, the Court having duly considered the foregoing matters, and no suggestion having been made by appellees that any reason exists for the denial of a preliminary injunction other than as reflected in the contentions enumerated above, or that circumstances have in the interim changed in any material respect, and the Court being of the view that the end result, namely, requiring the issuance of a preliminary injunction, would be the same whether the motion filed herein February 27, 1956, be treated as the equivalent of the taking of an appeal or as a petition for writ of mandamus, or for amendment of our judgment of November 10, 1955, we conclude that "to secure the just, speedy, and inexpensive determination" of this action (Rule 1, Federal Rules of Civil Procedure), justice will be best subserved by amending our judgment entered November 10, 1955, so as to require the District Court to issue a preliminary injunction as we intended, and as was issued by the District Court in *Farmer* v. *International Fur and Leather Workers Union,* which ruling this Court affirmed and which we relied on in our opinion of November 10, 1955, in this case.

Accordingly, it is ordered by the Court that the last paragraph of the judgment of this Court entered herein November 10, 1955, be, and it is hereby, amended by striking out the words "for further proceedings not inconsistent with the opinion of this Court" and inserting in lieu thereof the words "with directions to issue a preliminary injunction."

It is further ordered by the Court that the certified copy of the judgment of this Court dated November 10, 1955, in this case which issued to the District Court on December 9, 1955, be, and it is hereby, recalled.

It is further ordered by the Court that the Clerk be, and he is hereby, directed to issue a mandate to the District Court in this case on March 28, 1956.

PER CURIAM.

Dated: MARCH 15, 1956

APPENDIX B

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. ——

OCTOBER TERM, 1955

GUY FARMER, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONERS

vs.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 7, 1956.

EARL WARREN,
Chief Justice of the United States.

Dated this 31st day of January 1956.